IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PEITION NO.1557 OF 2004

Mr. Majid Oomerbhoy. ...Petitioner.

Versus

Workmen represented by Bhartiya
Kamgar Karmachari Mahasangh & Ors. ...
Respondents.

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Mr.J. P. Cama i/b. K. P. Anil Kumar for the Petitioner.
Mr.R. S. Pai for the Respondents.
Mrs. Tanu Mehta Tiwari for the Court Receiver.

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CORAM : DR. D.Y. CHANDRACHUD, J.

December 22, 2006.

P.C.:

The petition before the Court has been instituted by one of the partners of an erstwhile partnership known by the name of M/s.Ahmed Oomerbhoy. The partnership firm was engaged in the manufacture and sale of edible oil at its factory situated at Two Tanks, M.S. Ali road, Mumbai-400 008. At the material time, the firm had about 284 regular employees apart from whom, contract employees were engaged through certain contractors from time to time. A suit

was instituted before this Court (Suit 4913 of 2000) for dissolution and accounts. In the suit, by an ad-interim order dated 6th December 2000, the Court Receiver was appointed as Receiver of the business and assets of the partnership. The Notice of Motion for the appointment of a Receiver was made absolute on 31st July 2001. The Court Receiver took possession on 3rd September 2001. On a report of the Court Receiver, an order was passed by a Learned Single Judge of this Court (D.K. Deshmukh, J.) on 9th November 2001, directing the Receiver to make payment immediately to the regular workers for the month of October 2001. In so far as the contract workmen were concerned, the workmen and the parties were directed to submit a copy of the contract to the Receiver. Upon verification as to whether the contract was subsisting, the Receiver was directed to terminate the contract and make payment to the contract workmen for October 2001. By a further order of 30th November 2001, of a Learned Single Judge of this Court (F.I. Rebello, J.), the Court Receiver was directed to pay to the contract workers, by whichever contractor they were engaged and who had been paid for the month of October 2001, their salary for the month of November 2001. This

amount was to be adjusted against any dues that may be passed in the final order of adjudication by the appropriate forum. This Court, however, granted liberty to the applicant before the Court, Bharatiya Kamgar Karmachari Mahasangh, to move the State Government for a reference to adjudication.

2. Accordingly, on a demand raised by the Union, a reference to adjudication under Section 10 of the Industrial Disputes Act, 1947, was made. The reference related to 108 contract workmen, the claim being that the workmen be treated as permanent workmen and be given benefits at par with other permanent workmen of the establishment.

3. In the statement of claim, the averment was that the contract workmen in question, have been working with the partnership firm for about 22-25 years through contract agencies. The contention was that the service conditions of the contract workmen were revised in meetings between the management of the partnership and the workmen's representatives though formally settlements were in the

name of Labour contractors. In other words, the contention of the workmen was that the contract arrangements were a camouflage and that the relationship of employer and employee was between the workmen and the partnership firm. The workmen claimed that they were entitled to a declaration of permanency and to the payment of consequential benefits.

4. A Written Statement was filed on behalf of the management of the erstwhile partnership on 27th March 2003 inter alia contending that the partnership had engaged a contractor in the name of M/s. Varsha & Co. for carrying out specific jobs under a contract dated 19th September 1993. In the circumstances, there was a denial of the existence of a master and servant relationship between the partnership firm and the contract workmen. In any event, it was submitted that the partnership stood dissolved upon the order of this Court and that in pursuance thereof, the contract arrangement came to be duly terminated. The contention of the erstwhile employer was that payments towards salary were always made by the Contractors who maintained musters and salary registers.

5. In support of the claim in the reference, an affidavit in lieu of the Examination-in-chief was filed by one workman, Pandurang Hari Mrudgul. The workman stated that the workmen who were covered by the reference had put in a tenure of between 20 to 35 years. The workman contended that the arrangement with the contractors was sham and bogus. Reliance was sought to be placed on the affidavit that was filed by the Contractor.

6. The Industrial Tribunal by its award dated 6th February 2004 came to the conclusion that the contract arrangement was sham and bogus. Consequently, the Tribunal declared that 108 workmen whose names are mentioned in the schedule to the order of reference would be deemed to be permanent employees of the partnership firm and would be entitled to their wages for a further period on the basis of their last drawn wages for the month of December 2001.

7. The award is called into question in these proceedings under Article 226 of the Constitution. On behalf of the Petitioner, it

has been submitted that the Tribunal has granted a declaration of permanency on the basis of an entirely vague statement of one workman (among 108) that the workmen had worked for a period ranging between 20 to 35 years. No precise dates during which the workmen had been engaged were forthcoming. It is urged that evidence in regard to the allegation that the contract is sham and bogus was lacking. In the circumstances, it was submitted that particularly since the business of the establishment has come to an end upon the appointment of the Court Receiver as Receiver of the business and assets of the partnership in the suit for dissolution and accounts, the relief which has been granted by the Industrial Tribunal is unsustainable.

8. On the other hand, on behalf of the workmen, Counsel submitted, relying on the observations of the Tribunal, that the employer failed to produce evidence to rebut the case of the workmen and there was sufficient material to establish that the workmen had put in 20 to 35 years of service.

9. The basis on which the workmen moved the Industrial Tribunal was that the contracts between the management and the contractors were sham and bogus. It is a well settled principle of law that where contract workmen seek an abolition of a genuine contractual arrangement, recourse shall have to be had to the procedure laid down by the Contract Labour (Regulation and Abolition) Act, 1971. However, when the allegation is that the contract arrangement is sham and bogus, the submission proceeds on the basis that there is no genuine transaction with the contractor and that in substance, the workmen are the workmen of the principal employer. Before the Industrial Tribunal evidence was adduced on behalf of all the 108 workmen by a single contract employee. A perusal of the Examination-in-Chief would reveal that the evidence of the workman was completely vague. The workman stated that the work of the contract workmen was being supervised by the First Party Company, namely, by the partnership firm. The workman stated that workmen covered by the reference had worked between 20 to 35 years. Neither the dates on which individual workmen joined service, nor the tenure of each workman were separately shown. In the

course of the cross-examination, the workman was asked as to whether twelve such employees had crossed 55 years of age, presumably the age of superannuation. The workman stated that while there may be twelve employees who had crossed 55 years of age, he would not be able to state their names. On the one hand, the workman stated that the firm was deducting his Provident Fund. On the other hand, the workman stated that the Provident Fund was being paid by the Contractor. The workman had no documentary evidence to show that his work was being supervised by an officer of the partnership. The workman accepted the position that the business had closed down in the year 2001.

10. On this state of evidence, it was impossible for the Tribunal to have granted a declaration of permanency. The Tribunal relied on an affidavit produced by a person by the name of Shri Rashamwala who stated that even though he was a contractor, the contract was purely a paper arrangement. An application had been made by the workmen for seeking the production of certain documents. By then the Court Receiver had taken charge of the business. The Court

Receiver submitted before the Court that he was unable to produce documents in the absence of information from the erstwhile employer. The contractor was not in possession of documents of which a disclosure was sought. The Industrial Tribunal primarily relied upon an adverse inference that it drew upon the failure of the employer to produce the documents as aforesaid. In para 15 of the award, the Industrial Tribunal referred to the wagesheet, pay roll and list of 108 workmen. The list contained a typed statement of the date on which the workmen had joined service. The record and proceedings have been called for and Counsel appearing on behalf of the Court Receiver has assisted the Court in perusing the aforesaid list of workmen. A typed statement containing the names of workmen together with the date of joining cannot be regarded as substantive proof of the tenure of the workmen or of the period during which they had served. Substantive evidence is conspicuous by its absence in this case. One workman sought to depose on behalf of the entire batch of 108 but he was clearly unaware of the particulars pertaining to the entire body of workmen. The primary burden of establishing that the contract arrangement was sham lay upon the workmen. The

evidence of the sole witness who deposed on behalf of the workmen is vague in all respects and it is impossible to come to the conclusion that on his deposition any inference could have been drawn by the Tribunal that the contractual arrangement was sham and bogus. The award of the Tribunal is to that extent clearly unsustainable in law and will have to be interfered with.

11. The facts on the record show that the business of the erstwhile partnership has come to a standstill. By the ad-interim order of this Court in the suit for dissolution and accounts, the Court Receiver was appointed as Receiver on 6th December 2000. The Court Receiver has taken possession of the business and assets. The business stands closed. There is in these circumstances, no question of the workmen being granted benefits of permanency in so far as future benefits are concerned. Upon the closure of the business occasioned by the dissolution of the partnership, the services of the workmen will stand terminated. At the same time, it is just and proper that the workmen should be paid their closure compensation, gratuity and terminal benefits in accordance with law.

The difficulty which arises in the matter is in regard to the computation of the closure compensation in the absence of any specific material in regard to the length of service of each individual workman. In order to obviate this difficulty, all the Counsel have joined in stating before the Court that it would be appropriate and proper if the First Respondent is permitted to produce before the Court Receiver documentary material evidencing the length of service in respect of each individual workman. Counsel appearing on behalf of the First Respondent stated that the relevant records such as those relating to Provident Fund and ESI would be available from which the length of service can be deduced. Within a period of four weeks from today, the First Respondent will be at liberty to produce before the Court Receiver such documents as are available in respect of each individual workman, for the purposes of computing the period during which each workman had been engaged in the establishment of the erstwhile partnership. At this point of time, it would also be appropriate and proper if the computation of closure compensation is made on the basis of the average salary drawn by the permanent workmen of the erstwhile partnership. The statement which is

available on the record of the Court Receiver shows that the average salary of the regular workmen would be in the vicinity of Rs.5,000/- per month. This figure pf Rs.5,000/- per month would serve as a fair index of wages for computing closure compensation, in order to obviate a fresh controversy and another long drawn litigation. Fairly, none of the Counsel has expressed any reservation, since the effort of the parties before the Court is to ensure that the dues of the workmen are resolved without further delay. The workmen have not received their terminal dues since 2001. The Court Receiver shall proceed to compute the closure compensation on the basis of a last drawn salary of Rs.5,000/- per month having regard to the length of service that would be verified by him in respect of each individual workman. In the event that in the case of any particular workman no documents are forthcoming regarding length of service, the workman will be treated to be in service from 19th September 1993 which is the date on which the last contract was entered into by the erstwhile partnership with the Contractor, M/s. Varsha & Co. Dues on account of gratuity shall also be computed. The Court Receiver shall carry out the aforesaid exercise within a period of three months and then

submit a report to the appropriate Court to ensure expeditious disbursal of the terminal dues payable to the workmen on account of closure compensation and gratuity.

12. The workmen would be at liberty to move the Provident Fund Commissioner for their Provident Fund dues.

13. The petition shall stand disposed of in the aforesaid terms. There shall be no order as to costs.

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